

Maryjane Kenney

From: Roland Bartl
Sent: Monday, April 09, 2007 5:03 PM
To: Dore' Hunter; 'breichlen@makemwireless.com'
Cc: Manager Department; Walter Foster (office); 'Schnorr, Thomas'
Subject: RE: Article 39 discussions and negotiations

ARC zoning district:

Yes the Great Hill tower is on ARC land owned by the Acton Water District. The land has a water tower on it, too. Since this land is not restricted from building or development through deed or otherwise, both uses are legitimate uses allowed in ARC under the zoning bylaw - the water tower as a municipal use and the cell tower as a wireless communication facility. There is no mistake here that the Town according to Mr. Tuffin would be compelled to repeat on other ARC zoned lands. Further, I am not sure of the cited situations in Lincoln, Stow, and Carlisle, but Mr. Tuffin may not fully understand the circumstances there. It is unheard of that cities and towns would be compelled to repeat errors, just because they might have once inadvertently made a mistake.

The ARC zoning district is a diverse group of parcels primarily owned by the Town or the Water District, many - and primarily the Town's - are restricted from building and development through deed restrictions, or by the source of money by which their purchase was financed in whole or in part. Then, we cannot forget that a large portion of the ARC land, including much the Water District's, is in fact inundated by water, i.e. wetlands and unbuildable for that reason regardless of whether or not there exists a restriction by deed or funding source.

We looked once more at a selected group of Town-owned ARC lands:

1.

Many parcels of Town-owned ARC land are conservation or recreation lands purchased with State Self-Help grants or equivalent and are therefore restricted for passive recreation use, or passive and active recreation use. 301 CMR 5.09 states: "Property acquired or developed with assistance from the Self-Help or Urban Self-Help Program shall be retained and used at all times for open space purposes in accordance with M.G.L. c. 132, s. 11, and St. 1977, c. 933. Any property so acquired or developed shall not be wholly or partly converted to other than public outdoor recreation or conservation purposes without the approval of the Secretary (of Environmental Affairs). Converted property shall comply with Article 97 of the Massachusetts Constitution and shall be replaced with land of at least equal fair market value and of reasonable equivalent usefulness." Moreover, "Land and easements taken or acquired for such purposes (i.e. open space, conservation, etc.) shall not be used for other purposes or otherwise disposed of except by law enacted by a two thirds vote, taken by yeas and nays, of each branch of the General Court." (see Article 97 of the Massachusetts Constitution). Cell towers, even when not specifically excluded from use, are entirely inconsistent with conservation and recreation use, and it would be in violation of State law and the State Constitution to place one on land purchased with State Self-Help funds unless the required procedures are followed and the requisite relief is voted and granted. So, even if these lands do not have a specific no-build or no-development restriction in their deeds (we looked and we, too, could not see one) or attached to their deeds, these Statutory and Constitutional restrictions have the same effect, and may in fact be stronger than simple conservation restrictions.

The Open Space and Recreation Plan meticulously list all Town-owned conservation lands and the Self-Help number by which their acquisition was funded. Most of the prime Acton conservation land were purchased in whole or in part with State Self-Help funds:

Acton Arboretum
Land off Bulette Road
Camp Acton
Grassy Pond area
Great Hill
Guggins Brook
Heath Hen Meadow
Jenks Land

Nagog Hill
Pratt's Brook
Spring Hill
Will's Hole

2.

Many other parcels were donated, or sold at a favorable price, to the Town of Acton Conservation Commission, "pursuant to the provisions of Massachusetts General Law, Chapter 40, Section 8C". (for example other land on Great Hill and Nagog Hill). Section 8C establishes Conservation Commissions and entrusts them with the responsibility to hold land for conservation purposes for their respective communities. Again, no express prohibition of cell towers here, but a restriction on the use of the land nevertheless, that everybody relies upon.

3.

Finally, some conservation lands were deeded to the Town with the specific restriction that they be used for conservation purposes: " We, -----, for consideration of ----, receipt of which is hereby acknowledged, hereby grant to the inhabitants of the Town of Acton for conservation purposes ----- etc." There may be no specific reference to law. Some say this makes it weak, but it is still a conservation restriction. Sometimes there is a Treasurer's Deed indicating a Town Eminent Domain taking for conservation purposes.

Acton has no use variance. So, the likely outcome under a de-facto prohibition would be an unsuccessful variance application with subsequent adjudication in Court. But besides that, what is gained by relying on variances - other than opening the entire Town to cell tower sitings with high litigation cost for the Town?

Regards -

*Roland Bartl, AICP
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-----Original Message-----

From: Dore' Hunter
Sent: Sunday, April 08, 2007 10:16 PM
To: breichlen@makemwireless.com; Roland Bartl
Cc: Manager Department; Walter Foster (office)
Subject: Article 39 discussions and negotiations

Bruce,

I had a very long telephone conversation, that I initiated, tonight with Will Tuffin.

My purpose was to attempt to broker a last minute compromise re Article 3, namely to move to strike the petitioners' Article's paragraphs 1., 1.1, and the numbers 1.2, retaining the text of 1.2 but substituting the word "required" for "requested" in the retained final sentence.

As I had suspected Will immediately indicated that such would have to be coupled with a moratorium on accepting cell tower applications. In response to that I noted the TCA requirement for reasonable expedition in processing cell tower requests and suggested that I would not object to such, but could only consider extending the end date of any committee discussions to the time of a fall Town Meeting. However, Will did not express any interest in doing a deal at that point in our conversations.

Nevertheless Will later called me back, saying he had talked to several petitioners and they had all had "questions" why, if I was willing to broker a compromise, we could not append the necessary language changes to the Article 38 motion, saying it was easier for the Selectmen to change motion language than the petitioners. I explained that the deal would effectively be for Article 39 as it is

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currently written to be carried over to the Fall Town Meeting, at which time, if some other way of protecting residences and schools from cell towers etc. had been worked out the substitute measure would hopefully be adopted. If no substitute measure came forth from the committee created then the present Article 39 could be revived. I told him that any "deal" could not include the passage of Article 39 now, and in any event an amended 38 along these lines would conflict with Article 39. I also pointed out that an Article 39 motion amended as he suggested would be prone to "scope" issues since it does not mention residential zones or schools. Will did not seem to feel that ended the discussion, and we may talk further tomorrow.

[Assuming this discussion progresses favorably we might need Counsel's take on the best means of accomplishment at the Meeting. I don't know, for instance, if a Motion to Postpone Consideration of an Article to a Time Certain (Majority Vote) can be worded such that the "Time Certain" is a Fall Town Meeting for which no date has yet been set. I suspect not. If not I would go with go with Postpone Indefinitely to avoid a 2/3rd vote requirement.]

NOTES re argumentative portions of the conversations follow:

Needless to say, In the process of attempting to reach a compromise I once again failed to convince Will he/they might be creating an "effective prohibition" by seeking to impose his by-law amendment over the other restrictions, physical and legal, that might pertain to cell tower siting across the Town.

In the process of the discussion Will advanced arguments, which he said have their origins in what has happened in Lincoln, Stow and Carlisle (I think those were the towns, I was not taking notes) where, because the town involved had allowed a tower somewhere in a district (overlay?) where it should not otherwise have been allowed, they could not avoid other towers in the same zone. Therefore, he says, since the Great Hill towers are on ARC land, those zones are fully available everywhere in Town for cell towers now. He didn't think it mattered that the Great Hill land was owned by the Water District.

Will also advanced an argument that conservation lands were open for towers. He said he had read 7-9 deeds (parcels not identified) and saw nothing in them that would preclude tower construction. I could not get him to admit that there might be restrictions on conservation lands re commercial construction.

Will further said that the Zoning Board of Appeals could overturn any Planning Board decision, thus the tower applicants could go to them after a Planning Board refusal and so there could be no effective prohibition.

His response to the almost all grayed out map that Roland so laboriously constructed was to the effect that, 2 percent or so of available land for towers was more than enough.

Regards,
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